Lembaga Penggalakan Pelancongan Malaysia v One Big Option Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL SUIT NO W-02(NCVC)(W)-717–04 OF 2016
ROHANA YUSUF, VERNON ONG AND HASNAH HASHIM JJCA
16 OCTOBER 2017

Contract — Agreement — Breach — Sponsorship — Variation — Sponsorship of event — Parties entered into sponsorship event — Sponsorship in sum of RM10m — Claimant allegedly entitled to balance of RM3m — Claimant demanded for balance of RM3m but sponsor agreed to much lesser sum — Whether there was variation of sponsorship agreement — Whether there was breach of sponsorship agreement — Whether claimant submitted full report — Whether claim made within time limit — Limitation Act 1953 s 6

Popcorn Entertainment Pte Ltd, a production company based in India, conceptualised an event known as the 'Global Indian Film Awards', a yearly event highlighting the Indian film industry. In 2005, the respondent ('the plaintiff') was successful in its bid to host the 2006 Global Indian Film Awards ('GIFA 2006') in Kuala Lumpur. The plaintiff requested that the appellant ('the defendant') be the main sponsor of the GIFA 2006. The defendant agreed to be the main sponsor and entered into a sponsorship agreement with the plaintiff for GIFA 2006 ('the sponsorship agreement') where it was agreed that the sponsorship sum was RM10m. It was the plaintiff's case that the plaintiff was entitled to the remaining balance of the RM3m as stipulated in the sponsorship agreement. After the GIFA 2006 event concluded, the plaintiff demanded payment for the balance sum of RM3m but the defendant disputed the sum demanded. Instead, the defendant approved only a sum of RM249,800.71. Dissatisfied, the plaintiff filed a claim against the defendant at the High Court. The defendant filed a counterclaim for a declaration that the plaintiff breached the terms of the sponsorship agreement. After the close of the plaintiff's case, the defendant submitted a no case to answer and called no witness to testify on the grounds that: (a) the plaintiff's claim was time-barred; and (b) there was no evidence that the sponsorship agreement had been varied, and (c) the plaintiff failed to fulfil the terms of cl 4(c) of the sponsorship agreement to claim the remainder RM3m. In allowing the plaintiff's claim and dismissing the defendant's counterclaim, the High Court judge ('HCJ') held that: (i) there was a variation of the sponsorship agreement; (ii) the plaintiff did not breach the sponsorship agreement; (iii) the plaintiff had submitted a full report, as required by cl 4(c) of the sponsorship agreement and the said report was not rejected by the defendant; (iv) the plaintiff's claim was not time-barred. Hence the present appeal. The defendant submitted that the HCJ

failed to consider that: (A) the sponsorship agreement could not be varied unless made in writing; (B) the plaintiff had yet to fulfil the conditions under cl 4 of the sponsorship agreement; and (C) the statutory limitation period should be strictly applied and thus, the plaintiff's claim was time-barred.

Held, allowing the appeal in part:

(1) The burden of proof laid with the plaintiff. The plaintiff had to establish its case on a civil burden of probabilities. The fact that the defendant did not call any witness and that even if the plaintiff's evidence was unopposed did not necessarily mean that the evidence of the plaintiff satisfied the burden of proving that there was a variation agreed by the parties, and that the burden of proving on the balance of probabilities no longer applied, or that a case to answer is automatically made out. The evidence adduced by the plaintiff must still be sufficient to prove the existence of the purported variation and that the plaintiff was entitled to the payment of RM3m. It was patently clear that the plaintiff had not discharged the burden to prove its case on a balance of probabilities (see paras 16 & 21).

(2) Based on both the oral and documentary evidence, the defendant's obligation to disburse the RM3m could not have arisen as the plaintiff failed to fulfil its obligations pursuant to cl 4(c) of the sponsorship agreement. The HCJ failed to give sufficient judicial appreciation of the evidence before Her Ladyship. The HCJ failed to elucidate the evidence which she had relied on to determine and conclude that the parties varied the agreement. Her Ladyship did not refer to any of the 'abundant evidence' oral and documentary she had stated in her grounds of judgment to support her findings that there was a variation. On the contrary, the documentary evidence that was before the court suggest otherwise. The plaintiff's witness ('PW2') testified that since the defendant paid the said sum to the plaintiff, the defendant had varied the sponsorship agreement. In fact, PW2 admitted from his testimonies before the court that there was no document produced to support that the sponsorship agreement had been varied neither were there any documents which corroborated with the invoices tendered by the plaintiff in support of its claim of the balance RM3m (see paras 38 & 41).

(3) It was the intention of the parties, as stipulated in the sponsorship agreement that the defendant's obligation to pay arose only at the conclusion of the GIFA 2006, which was on 9 December 2006 and upon the submission of the full report by the plaintiff. This was confirmed by the plaintiff's own witness who gave evidence that the defendant's obligation arose when the plaintiff submitted its report on 19 January 2007. The claim was clearly time-barred by virtue of s 6(1) of the Limitation Act 1953, which stipulates that a claim founded on contract

A or tort must be brought within six years from the date of accrual of the cause of action. Hence, when the action was filed in 2013, limitation had set in (see paras 48–49).

[Bahasa Malaysia summary

B Popcorn Entertainment Pte Ltd, satu syarikat penerbitan di India, mengkonsepsikan satu acara yang dikenali sebagai 'Global Indian Film Awards', acara yang mengetengahkan industri perfileman India pada 2005, responden ('plaintif') berjaya dalam bidaannya untuk mengacarakan 2006 C Global Indian Film Awards ('GIFA 2006') di Kuala Lumpur. Plaintif memohon agar perayu ('defendan') menjadi penaja utama GIFA 2006. Defendan bersetuju menjadi penaja utama dan memasuki perjanjian tajaan dengan plaintif bagi GIFA 2006 ('perjanjian tajaan') yang mana disetujui bahawa jumlah tajaan adalah RM10 juta. Menjadi kes plaintif bahawa plaintif D berhak mendapat baki sebanyak RM3 juta seperti yang dinyatakan dalam perjanjian tajaan. Selepas tamat GIFA 2006, plaintif menuntut bayaran jumlah baki sebanyak RM3 juta tersebut tetapi defendan mempertikaikan jumlah tersebut. Sebaliknya, defendan hanya meluluskan jumlah sebanyak RM249,800.71. Tidak berpuas hati, plaintif memfailkan tuntutan terhadap E defendan di Mahkamah Tinggi. Defendan memfailkan tuntutan balas bagi deklarasi bahawa plaintif melanggar terma-terma perjanjian tajaan. Selepas penutup kes plaintif, defendan memilik untuk tidak menjawab kes dan tidak memanggil saksi memberi keterangan atas alasan-alasan: (a) tuntutan plaintif dikekang oleh had masa; dan (b) tiada keterangan bahawa perjanjian tajaan F telah divariasi; dan (c) plaintif gagal memenuhi terma-terma klausa 4(c) perjanjian tajaan untuk menuntut RM3 juta. Dalam membenarkan tuntutan plaintif dan menolak tuntutan balas defendan, hakim Mahkamah Tinggi ('HMT') memutuskan: (i) tiada variasi perjanjian tajaan; (ii) plaintif tidak melanggar perjanjian tajaan; (iii) plaintif telah mengemukakan laporan penuh, G seperti yang dikehendaki oleh klausa 4(c) perjanjian tajaan dan laporan ini tidak ditolak oleh defendan; (iv) tuntutan plaintif tidak dikekang had masa. Oleh itu rayuan ini difailkan. Defendan menghujahkan HMT gagal mempertimbangkan bahawa: (A) perjanjian tajaan tidak boleh divariasikan kecuali dibuat secara bertulis; (B) plaintif belum memenuhi syarat-syarat di H bawah klausa 4 perjanjian tajaan; dan (C) tempoh kekangan statutori haruslah terpakai dengan ketat dan dengan itu, tuntutan plaintif dikekang had masa.

Diputuskan, membenarkan sebahagian rayuan:

I (1) Beban pembuktian terletak pada plaintif. Plaintif telah membuktikan kesnya atas beban kebarangkalian sivil. Fakta bahawa defendan tidak memanggil mana-mana saksi dan bahawa jika pun keterangan plaintiff tidak dibantah tidak bermakna keterangan plaintif memenuhi beban pembuktian bahawa terdapat variasi yang disetujui oleh pihak-pihak dan beban pembuktian atas imbangan kebarangkalian tidak lagi terpakai atau

bahawa kes untuk dijawab berjaya dibuktikan secara automatik. Keterangan yang dikemukakan oleh plaintif mestilah cukup untuk membuktikan kewujudan variasi yang didakwa dan bahawa plaintif berhak mendapat bayaran RM3 juta. Jelas bahawa plaintif tidak melepaskan bebannya untuk membuktikan kes atas imbangan kebarangkalian (lihat perenggan 16 & 21).

(2) Berdasarkan kedua-dua keterangan lisan dan dokumentar, kewajipan defendan untuk membayar semula RM3 juta tersebut tidak mungkin timbul kerana plaintif gagal memenuhi kewajipannya bawah klausa 4(c) perjanjian tajaan. Hakim Mahkamah Tinggi gagal memberi pertimbangan kehakiman yang secukupnya terhadap keterangan di hadapan beliau. Hakim Mahkamah Tinggi gagal menerangkan keterangan yang menjadi sandaran beliau untuk menentukan dan menyimpulkan bahawa pihak-pihak menvariasikan perjanjian. Beliau tidak merujuk mana-mana 'lambakan keterangan' lisan dan dokumentar yang beliau nyatakan dalam alasan penghakiman beliau untuk menyokong dapatan bahawa terdapat variasi. Sebaliknya, keterangan dokumentar di hadapan mahkamah adalah sebalinya. Saksi plaintif ('PW2') memberi keterangan bahawa memandangkan defendan membayar jumlah tersebut kepada plaintif, defendan telah menvariasi perjanjian tajaan tersebut. Malah, PW2 mengaku dalam keterangan-keterangannya di mahkamah bahawa tiada dokumen yang dikemukakan untuk menyokong bahawa perjanjian tajaan telah divariasi mahupun dokumen-dokumen yang menyokong invois-invois yang dikemukakan oleh plaintif menyokong tuntutan baki RM3 juta (lihat perenggan 38 & 41).

(3) Adalah menjadi niat pihak-pihak, seperti yang dinyatakan dalam perjanjian tajaan bahawa kewajipan defendan untuk membayar bangkit hanya apabila tamatnya GIFA 2006, iaitu 9 Disember 2006 dan apabila laporan penuh dikemukakan oleh plaintif. Ini disahkan oleh saksi plaintif sendiri yang memberi keterangan bahawa kewajipan defendan berbangkit apabila plaintif mengemukakan laporannya pada 19 Januari 2007. Tuntutan ini jelas dikekang had masa di bawah s 6(1) Akta Had Masa 1953, yang menyatakan bahawa tuntutan berasaskan kontrak atau tort mestilah dikemukakan dalam masa enam tahun dari tarikh terakrunya kausa tindakan. Oleh itu, apabila tindakan difailkan pada 2013, had masa telah bermula (lihat perenggan 48–49).]

Notes

For cases on breach of agreement, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3278–3286.

Cases referred to

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)

Lee Ing Chin @ Lee Teck Seng v Gan Yook Chin [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)

Merita Merchant Bank Singapore Ltd v Dewan Bahasa dan Pustaka [2014] MLJU 1807; [2014] 9 CLJ 1064, FC (refd)

Mohd Nor Afandi Mohamed Junus v Rahman Shah Alang Ibrahim & Anor [2008] 3 MLJ 81; [2008] 2 CLJ 369, CA (refd)

Nadefinco Ltd v Kevin Corporation Sdn Bhd [1978] 2 MLJ 59; [1978] 1 LNS 127, FC (refd)

Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim [2015] 3 MLJ 609; [2015] 2 CLJ 1037, FC (folld)

Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229; [1979] 1 LNS 119, FC (folld)

Wilkinson v Verity (1871) LR 6 CP 206 (refd)

Legislation referred to

Evidence Act 1950 ss 91, 92, 114(g)

Limitation Act 1953 ss 6(1), 26(2)

Appeal from: Civil Suit No 22NCVC-332–05 of 2013 (High Court, Kuala Lumpur)

Khoo Guan Huat (Grace Teoh Wei Shan with him) (Skrine) for the appellant.

Sukhdev Singh Randhawa (Muhamed Faris bin Mohd Ali with him) (Azlan Shah & Sukhdev & Co) for the respondent.

Hasnah Hashim JCA (delivering judgment of the court):

[1] The appeal before us was against the decision of the learned High Court judge in Kuala Lumpur High Court Civil Suit No S-23(NCVC)-95–11 of 2013 given on 26 March 2015 allowing the respondent's (the plaintiff in the High Court) claim. We had, after perusing the record of appeal and considering the written and oral submissions of learned counsels for the appellant and the respondent, unanimously allowed the appeal in part with costs. We set aside the High Court order and ordered the deposit to be refunded. Our reasons appear below.

[2] For the purpose of this judgment, the parties will be referred to as they were referred to in the High Court.

FACTUAL BACKGROUND

[3] A production company based in India known as 'Popcorn Entertainment Pte Ltd' ('Popcorn') conceptualised an event known as the 'Global Indian Film Awards' ('GIFA'). GIFA is a yearly event highlighting the Indian film industry. Sometime in 2005, the plaintiff participated in a bid to host the 2006 Global Indian Film Awards ('GIFA 2006') and succeeded in acquiring the sole right to host the GIFA 2006 in Kuala Lumpur.

[4] The plaintiff submitted a sponsorship proposal dated 14 September 2005 of the Ministry of Tourism requesting that the defendant be the main sponsor of the GIFA 2006. On 4 October 2006 Popcorn entered into an agreement with the plaintiff to organise and carry out promotional activities in respect of the GIFA 2006.

[5] The defendant agreed to be the main sponsor. Subsequently, on 14 November 2006, the defendant and the plaintiff entered into a sponsorship agreement in respect of the GIFA 2006 (the 'sponsorship agreement'). Under the said sponsorship agreement the defendant agreed to sponsor the GIFA 2006 for sum of RM10m ('the grant') subject to terms and conditions as expressly stipulated in the said agreement.

[6] In respect of the grant, on the request of the plaintiff, the defendant made two payments amounting to RM7m to the plaintiff. It is the plaintiff's pleaded case that the plaintiff is entitled to the remaining balance of the RM3m as stipulated in the sponsorship agreement.

[7] On 9 December 2006 the GIFA 2006 event concluded. The plaintiff demanded payment for the balance sum RM3m of the grant vide a letter dated 19 January 2007. Together with the demand a report dated 26 December 2006 in support of the payment was submitted.

[8] The defendant on 16 February 2007 informed the plaintiff that the defendant disputed the sum demanded. By a letter dated 20 February 2009 the defendant informed the plaintiff that after reviewing and verifying the claim submitted the defendant approved only a sum of RM249,800.71, out of the RM3m demanded.

[9] Dissatisfied with the decision the plaintiff filed the suit in the High Court on 3 March 2013. The defendant filed its counterclaim seeking for a declaration that the plaintiff breached the terms of the sponsorship agreement.

[10] After the close of the plaintiff's case the defendant submitted a no case to answer and called no witness to testify. It was contended by the defendant that the plaintiff case should fail on the basis that:

(a) the plaintiff's claim was time-barred; and

(b) further or in the alternative, there is no evidence that the sponsorship agreement had been varied, and the plaintiff had failed to fulfil the terms of cl 4(c) of the sponsorship agreement to claim the remainder RM3m from the sponsorship grant.

[11] The learned High Court judge found in favour of the plaintiff and allowed the plaintiff's claim with costs and interest, and dismissed the defendant's counterclaim.

THE HIGH COURT FINDINGS

[12] In view of the submission of no case to answer at the close of the plaintiff's case, the learned High Court judge had to deal with how the plaintiff's claim ought to be considered. Her Ladyship's findings and conclusion, can be summarised as follows:

(a) there was a variation of the sponsorship agreement. The defendant had made two payments in the absence of any written agreement pursuant to cl 15(b) of the sponsorship agreement. The defendant is thus estopped from insisting on a written agreement as proof of their dealings;

(b) by unilaterally issuing the five cheques, the plaintiff's contention that the defendant had breached the sponsorship agreement, is not without basis;

(c) the plaintiff did not breach the sponsorship agreement;

(d) the plaintiff had submitted the full report as required pursuant to cl 4(c) of the sponsorship agreement and that the said report was not rejected by the defendant;

(e) there was overwhelming evidence to show that the plaintiff had complied with cl 4(c) of the sponsorship agreement to submit their claim for the balance sum of RM3m. The defendant is obliged to pay unless the full report submitted was not in compliance with the requirements of cl 4(c) of the aforesaid agreement;

(f) that the plaintiff's claim was not time-barred. The report was submitted on 19 January 2007 in compliance with cl 4(c) of the sponsorship agreement. Section 26(2) of the Limitation Act 1953 is applicable in this case; and

(g) the title sponsor was never granted to any third party and there was no profit involved. Therefore, the defendant did not suffer any loss.

THE APPEAL

[13] In the memorandum of appeal the defendant raised several grounds. The main thrust of the defendant's appeal was that the learned High Court judge had failed to judicially evaluate and appreciate the evidence before the court. Learned counsel for the defendant invited us to intervene as it was the defendant's contention that the learned trial judge had erred in the findings of facts. Learned counsel for the defendant focused his submissions on the following grounds:

(a) the learned High Court judge failed to consider that the sponsorship agreement could not be varied unless made in writing. In light of the evidence from the plaintiff's own witnesses, the plaintiff had yet to fulfil the conditions as stipulated in cl 4 of the sponsorship agreement; and

(b) the learned High Court judge failed to consider that the statutory limitation period should be strictly applied and thus, the plaintiff's claim is time-barred.

[14] We will address each ground advanced by learned counsel for the defendant in turn.

DECISION

No case to answer

[15] On the effect of a submission of no case to answer, we are guided by the decision of the apex court in *Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim* [2015] 3 MLJ 609; [2015] 2 CLJ 1037. In dealing with the issue of whether the appellate court can and ought to disturb findings of fact reached by the trial court where the evidence led by the plaintiff are assumed to be true when the defendant elected not to call any witnesses, the Federal Court made the following observations at p 617 (MLJ); p 1059 (CLJ):

> [56] ... The first is that the principle on which an appellate court could interfere with findings of fact by the trial court is the plainly wrong test (see *Gan Yook Chin & Anor v Lee Ing Chin & Ors* [2005] 2 MLJ 10; [2004] 4 CLJ 309 and *UEM Group Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785). And, the second is that the burden of proof at all times is of course borne by the plaintiff to establish on the balance of probability the existence of a legally enforceable settlement agreement (see *Ranbaxy (Malaysia) Sdn Bhd v El Du Pont De Nemours and Company* [2011] MLJU 1135; [2011] 1 LNS 16; [2011] 1 AMCR 857). In other words, it was upon the plaintiff itself, and certainly not the defendant, to discharge

the burden of showing the settlement agreement had come into existence. It is for the plaintiff to prove its case and satisfy the court that its claim is well-founded before the court grants judgment on the claim (see *The Owners Of And All Other Persons Interested In The Ships Fordeco No 12 And Fordeco No 17 v Shanghai Hai Xing Shipping Co Ltd, The Owners Of The Ship Mv Xin Hua 10* [2000] 1 MLJ 449; [2000] 1 CLJ 695; *Maju Holdings Sdn Bhd v Fortune Wealth (HK) Ltd & Other Appeals* [2004] 4 MLJ 105; [2004] 4 CLJ 282 and *Teh Swee Lip v Jadewell Holdings Sdn Bhd* [2013] 6 MLJ 32; [2014] 8 CLJ 451). It is true that in the present case the defendant elected not to call any witnesses. However, it is imperative to bear in mind that from the outset the legal burden of the existence of the settlement agreement was with the plaintiff as the claimant in the present action. By reasons of the legal principles, the fact that the defendant led no evidence or call no witnesses did not absolve the plaintiff from discharging its burden in law. In this regard, in adopting the approach of the case of *Storey v Storey* [1961] P 63, Suriyadi JCA (as His Lordship then was) in *Mohd Nor Afandi Mohamed Junus v Rahman Shah Alang Ibrahim & Anor* [2008] 3 MLJ 81; [2008] 2 CLJ 369 recognised this to be the case as can be seen from the following passage of His Lordship's judgment:

> There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case there may be a submission that, accepting the plaintiff's evidence at its face value, no case has been established in law, and in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged.

[57] We therefore agree with the submission of learned counsel for the defendant to the effect that despite the fact the defendant did not call any witness and that even if the plaintiff's evidence is unopposed (and therefore presumed to be true), this does not automatically equate to that evidence satisfying the burden of proving the existence of the settlement agreement borne by the plaintiff, or mean that the burden of proving on the balance of probabilities no longer applies, or that a case to answer is automatically made out. The evidence adduced by the plaintiff must still be sufficient to prove the existence of the settlement agreement. This crucial point was overlooked by the learned High Court judge. On the factual matrix of the case, it is patently clear that the plaintiff has not discharged the burden. On this basis, the Court of Appeal was in every respect justified in holding that the learned High Court judge was plainly wrong in making a ruling of law that the settlement agreement had come into existence based on the conduct of the both parties. Indeed, the election by the defendant to call no evidence at trial does not preclude the reversal of a plainly wrong finding of the learned High Court judge by the Court of Appeal.

[16] Guided by the abovementioned case we remind ourselves that at all times, the burden of proof lies with the plaintiff. The plaintiff has to establish its case on a civil burden of probabilities. The fact that the defendant did not call any witness and that even if the plaintiff's evidence is unopposed does not necessarily mean that the evidence of the plaintiff satisfied the burden of proving that there was a variation agreed by the parties, and that the burden of

proving on the balance of probabilities no longer applies, or that a case to answer is automatically made out. The evidence adduced by the plaintiff must still be sufficient to prove the existence of the purported variation and that the plaintiff was entitled to the payment of RM3m.

[17] Where the defendant does not lead evidence to prove its defence or discharge the onus of proof which may have shifted to the defendant, then all that would be available for the court to examine in order to determine the claim would only be the plaintiff's version of the facts. As espoused by the Federal Court in *Syarikat Kemajuan Timbermine Sdn Bhd*, 'even if the plaintiff's evidence is unopposed (and therefore presumed to be true), this does not automatically equate to that evidence satisfying the burden of proving the existence of the settlement agreement borne by the plaintiff, or mean that the burden of proving on the balance of probabilities no longer applies, or that a case to answer is automatically made out. The evidence adduced by the plaintiff must still be sufficient to prove the existence of the settlement agreement'.

[18] Therefore, even though the defendant had elected to a 'no case to answer' the trial court is not absolved of its duty to look at the entire evidence of the plaintiff and his witnesses, which also includes the answers given under cross-examination in order to determine whether the plaintiff had adequately discharged his burden. The trial court must evaluate the evidence of the plaintiff in its entirety. That evaluation is by considering, inter alia, whether the plaintiff's evidence is challenged successfully in cross-examination and also based on the documentary evidence adduced.

[19] It is important to bear in mind that the learned trial judge came to the conclusion as a matter of fact and law that there was sufficient evidence to conclude that there was a variation both oral and documentary. She had also concluded that since the defendant had made the two payments in the absence of any written agreement pursuant to cl 15(b) of the sponsorship agreement was sufficient proof that the defendant agreed to the arrangement and was estopped from insisting on any written agreement as proof of their dealings.

[20] Suriyadi JCA (as His Lordship then was) in *Mohd Nor Afandi Mohamed Junus v Rahman Shah Alang Ibrahim & Anor* [2008] 3 MLJ 81; [2008] 2 CLJ 369 elucidated in his judgment as follows:

> There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case there may be a submission that, accepting the plaintiff's evidence at its face value, no case has been established in law, and in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged.

[21] The plaintiff's witness, PW2 (Satnam Singh Dhillon a/l Harjeet Singh, a director of the plaintiff) had affirmed that the obligation of the defendant to pay arose on 19 January 2007 and that there was no evidence that the sponsorship agreement had been varied in writing. The evidence adduced by the plaintiff must be sufficient to prove the existence of the variation. With respect, given the factual matrix of this case and having perused the learned judge's grounds of judgment as well as the notes of evidence we are of the considered view it is patently clear that the plaintiff has not discharged the burden to prove its case on a balance of probabilities.

Whether the learned High Court judge failed to consider that there could be no variation to the sponsorship agreement unless made in writing and in light of the evidence from the plaintiff's own witnesses, the plaintiff had yet to fulfil the conditions in cl 4 of the sponsorship agreement

[22] By a letter dated 19 October 2006 the defendant agreed to sponsor the GIFA 2006. The terms and conditions of the sponsorship was specified, itemised and stipulated in detail in the sponsorship agreement executed between the parties. The defendant will make payment in accordance with the terms of the agreement provided all the terms and conditions of the said agreement have been complied with by both parties. In consideration of the rights granted to the defendant and the undertakings by the plaintiff, the defendant agreed to grant the plaintiff a total sum of RM10m ('the sponsorship grant') subject to the terms and conditions of the agreement:

> Clause 4 SPONSORSHIP GRANT
>
> (a) In consideration of the rights granted to TM and the undertakings by OBO under this agreement, TM shall grant to OBO a total sum of Ringgit Malaysia Ten Million (RM10,000,000.00) Only (hereinafter referred to as the 'Sponsorship Grant') subject to the terms and conditions hereinafter appearing ...

[23] Clause 4(c) of the said sponsorship agreement further stipulates as follows:

> The Sponsorship Grant payable by TM to OBO under this agreement shall be paid after the conclusion of the event and subject always to the submission of the full report by OBO to TM which shall include all the activities involving costs, expenses and revenue (if any) of the Event supported by third party invoices and any other supporting documents to proof that all deliverables of the sponsorship benefits as specified in schedule 1, have been delivered together with proof of delivery of benefits such as photographs, printed materials, brochures, CDs, slides or any other proof of deliverables.

[24] It was the plaintiff's pleaded claim that the defendant had agreed to make an advance payment of the sponsorship grant in the sum of RM7m before GIFA 2006 based on the plaintiff's need to make urgent payments to

kick start GIFA 2006 and that it was agreed that the balance sum of RM3m would be paid after the conclusion of GIFA 2006.

[25] According to the testimony of PW2 the parties had agreed that the drawdown of the sponsorship grant of RM10m shall be paid to the plaintiff in the following manner:

(a) the defendant would make an advance payment of the sponsorship grant to the plaintiff in the sum of RM7m before the start of the GIFA 2006;

(b) the defendant would make the advance payment to the plaintiff before the start of the GIFA 2006 based on the plaintiff's need to make payments which were urgent and important to kick start the said event; and

(c) the defendant would pay the balance of the sponsorship grant in the sum of RM3m to the plaintiff after the conclusion of the GIFA 2006.

(Re: Q/A14 of PW2's witness statement.)

[26] In the same witness statement PW2 had also stated that:

> This variation of the terms contained in clause 4(a) and (c) of the sponsorship agreement was agreed to by both the plaintiff as well as the defendant.

[27] However, PW2 did not adduce any documentary evidence to support his contention that the parties had agreed to a variation of the agreement. The plaintiff contended that on 30 November 2006 the defendant paid the sum of RM3,452,462 to the plaintiff vide five cheques. Prior to the said payment the plaintiff did not submit any supporting documents in respect of the GIFA 2006 to the defendant. Learned counsel for the plaintiff submitted that by its conduct of making the payments the defendant had in essence varied the terms of the sponsorship agreement.

[28] The defendant did not deny that prior to the commencement of GIFA 2006 the defendant had made payments in the sum of RM3,452,462 through five cheques all dated 30 November 2006 after verification of the expenses with the supporting documents as required by the terms of the agreement as follows:

Cheque No	Payment Voucher	Amount
131436	0609154	RM882,940
131437	0609155	RM729,522
131438	0609156	RM736,000
131439	0609157	RM846,400
131440	0609158	RM257,600
Total Advance Payment		RM3,452,462

A **[29]** The GIFA 2006 concluded on 9 December 2006. However, the plaintiff only submitted its report to the defendant on 19 January 2007. After verification the defendant paid a further sum of RM3,547,538 to the plaintiff on 12 February 2007. The defendant issued a letter dated 16 February 2007 to the plaintiff seeking clarification on the discrepancies of the financial B statements in particular invoice C-0008-INV-0001 dated 5 February 2007. In the same letter the defendant stated that the two progressive payments were made in accordance to the terms of the agreement that is, after verification of the expenses with the supporting documents, invoices and third party bills.

C **[30]** It was also highlighted by the defendant in the said letter that the plaintiff was in breach of cl 13(c) of the agreement as an entity known as 'Provogue' was involved in all major promotional materials for GIFA 2006 without the written consent of the defendant.

D **[31]** Clause 4(d) of the said agreement stipulates that the defendant may withhold or suspend any payment in whole or in part until the plaintiff performed its obligations under the aforesaid agreement and all the documents required for payment has been submitted:

E > Without limiting TM's rights, TM may withhold or suspend any payment in whole or in part until OBO performed its obligations under this agreement and all the documents required for payment has been submitted.

F **[32]** The plaintiff argued that cll 4(a) and (c) of the agreement have been varied by conduct and that the defendant was obliged to make payment of the balance sum of RM3m to the plaintiff without having to fulfil the terms as stipulated in cl 4(c). Accordingly, the defendant's obligation to pay the plaintiff arose on 19 January 2007. The plaintiff in evidence stated that since the G defendant had made the two progressive payments without any supporting evidence the defendant had by its own conduct varied the agreement in particular cl 4(c).

[33] The defendant took a different position. It was argued by the H defendants that the payments were made after verifications were made as explained in their letter dated 16 February 2007. The plaintiff in their letter in response dated 15 March 2007 did not deny that verifications were made before the two payments were. It was only when PW2 gave evidence did he testified that there were no supporting documents submitted to justify the I payments.

[34] Clause 15(b) of the sponsorship agreement further stipulates that any variation or modification of the agreement must be mutually agreed by the parties:

> The agreement can only be modified by mutual agreement between the parties in writing.

[35] It was the evidence of the plaintiff that there was a variation of the terms of the agreement. According to the plaintiff the defendant had agreed to pay the advance payment of RM7m before the commencement of GIFA 2006 and the balance sum of RM3m after the event concluded. The learned High Court judge accepted the evidence of PW2 that the defendant agreed that the drawdown should be paid on an immediate basis and that no supporting document was required. The learned High Court judge acknowledged the fact that based on the evidence there was no other agreement for the GIFA 2006 other than the sponsorship agreement. If the defendant had not agreed to a variation of cll 4(a) and (c) there would be no monies paid. Her Ladyship stated, in para 37 of the judgment that:

> The reason for the payment, whether it be due to an appeal by the plaintiff of goodwill gesture on their part, is in my view immaterial. Contemporaneous documentary evidence showed that apart from the payment of RM3,452,462 on 30 November 2006, the defendant made another payment of RM3,547,538 on 12 February 2007 even before the matters relating to the full and final report was finalised.

[36] The learned High Court judge was of the view that the since the defendant had elected not to call any witnesses it had denied the court of the best evidence. The failure of the defendant to explain, entitled the court to presume that the evidence of the defendant's witness would not support its case and an adverse inference under s 114(g) of the Evidence Act 1950 should be invoked.

[37] In her grounds of judgment Her Ladyship opined that ss 91 and 92 of the Evidence Act 1950 does not apply in this case when she said:

> It is my finding that the provisions of ss 91 and 92 of the Evidence Act 1950 does not apply to this instant case. The plaintiff is not restricted from proving and claiming the variation using extrinsic evidence. Variation was permissible under cl 15(b) of the sponsorship agreement. What is wanting is an agreement in writing. It must be said in all fairness that there is abundant evidence showing that there was a variation both oral and documentary.

[38] The learned High Court judge failed to elucidate the evidence which she had relied on to determine and conclude that the parties varied the agreement. Her Ladyship did not refer to any of the 'abundant evidence' oral and documentary she had stated in her grounds of judgment to support her findings that there was a variation. On the contrary, the documentary evidence that was before the court suggest otherwise. PW2 in his evidence testified that since the defendant had paid the said sum to the plaintiff the defendant had

varied the sponsorship agreement however, he offered no other evidence and any explanation in support of his contention. In fact, PW2 admitted from his testimonies before the court that there was no document produced to support that the sponsorship agreement had been varied neither were there any documents which corroborated with the invoices tendered by the plaintiff in support of its claim of the balance RM3m:

D1: Can you please show this court one document form the plaintiff asking for RM7m before the GIFA event on 6 December 2006?

PW2: Before 6 December 2006. Any documents from OBO? There is none Yang Arif.

(Re: p 216; *rekod rayuan* (*Jld 2(1) — Bahagian B*)); and

D1: You would agree with me that in clause 15(b) of the agreement entered between the parties there is no written document by mutual agreement between parties on the variation that you are saying?

PW2: *You mention no written agreement.*

D1: Yes

PW2: *Yes Yang Arif. There was no written agreement.*

(Re: p 229; *rekod rayuan* (*Jld 2(1) — Bahagian B*).)

[39] An appellate court will not intervene unless the trial court is shown to be plainly wrong in arriving at its conclusion and where there has been insufficient judicial appreciation of the evidence. Justice Raus Sharif (President of the Court of Appeal as he then was) elucidated that the appellate court will intervene in a case where the trial court has so fundamentally misdirected itself (*Merita Merchant Bank Singapore Ltd v Dewan Bahasa dan Pustaka* [2014] MLJU 1807; [2014] 9 CLJ 1064). The Federal Court in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453 reiterated the principle to be adopted by an appellate court when reversing the findings of fact by a trial court:

> ... It is now established that the principle on which an appellate court could interfere with findings of fact by the trial court is 'the plainly wrong test' principle; see the Federal Court in *Gan Yook Chin & Anor (P) v Lee Ing Chin@Lee Teck Seng & Anor* [2005] 2 MLJ 1; [2004] 4 CLJ 309 per Steve Shim CJ (Sabah and Sarawak). More recently this principle of appellate intervention was affirmed by the Federal Court in *UEM Group Bhd v Genisys Integrated Pte Ltd* [2010] 9 CLJ 785 where it was held at p 800:
>
> > It is well-settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence (see *Chow Yee Way & Anor v Choo Ah Pat* [1978] 1 LNS 32; *Watt v Thomas* [1947] AC 484

and *Gan Yook Chin & Anor v Lee Ing Chin & Ors* [2004] 4 CLJ 309). A

[40] Therefore, the failure of the High Court judge to consider the entirety of the evidence and material issues or the failure to make findings of fact or the making of bare findings of fact will invite appellate intervention. Such omissions by a trial judge will require the appellate courts to take on the role of first instance judge and review the evidence in its entirety afresh. In the oft quoted case of *Lee Ing Chin @ Lee Teck Seng v Gan Yook Chin* [2003] 2 MLJ 97; [2003] 2 CLJ 19 the Court of Appeal held as follows: B

> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same. C D E

[41] Based on both the oral and documentary evidence we agree with learned counsel for the defendant's submission that the defendant's obligation to disburse the RM3m from the sponsorship grant could not have arisen as the plaintiff failed to fulfil its obligations pursuant to cl 4(c) of the sponsorship agreement. We found that the learned judge, with respect, had failed to give sufficient judicial appreciation of the evidence before her. On a perusal of the notes of evidence we found that the plaintiff's own witness ('PW2') had admitted that there was no written agreement of a variation of the agreement as required under the said agreement. In her grounds of judgment the learned High Court judge did not specify or identify the documents she had relied upon to arrive at her conclusion and findings that the parties had varied the sponsorship agreement. Her Ladyship had totally disregarded the cross-examination of the plaintiff's witnesses by the defendant's counsel challenging the evidence of the witnesses. F G H

[42] We find guidance in the case of *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229; [1979] 1 LNS 119 where the trial judge had found the plaintiff in that case guilty of fraudulent misrepresentation based on the veracity of the defendant and its witnesses. On appeal, the Federal Court reversed his finding of fraud. Chang Min Tat FJ said: I

A Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I would with respect feel somewhat safer to refer to and rely on
B the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the oral evidence be critically tested
C against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

[43] We have carefully perused the appeal record and considered the respective submissions of the parties that the findings of the learned High
D Court judge are without any supporting evidence or reasoning. We are satisfied that the learned High Court judge failed to judicially appreciate the evidence and fell into serious error with regard to Her Ladyship's findings.

The learned High Court judge failed to consider that the statutory limitation period
E *should be strictly applied and thus, the plaintiff's claim is time-barred*

[44] Learned counsel for the defendant submitted that the plaintiff's claim is time-barred pursuant to s 6(1) of the Limitation Act 1953 for the following reasons:

F (a) the two conditions which must be fulfilled before the defendant's obligation to disburse the sponsorship grant arises:

(i) only after the conclusion of the 2006 GIFA; and

G (ii) the submission of the complete report with the supporting documents to the defendant;

(b) it was the plaintiff's case that cll 4(a) and (c) of the sponsorship agreement have been varied to the extent that the defendant was obliged to make payment notwithstanding the agreed terms of the aforesaid
H agreement whereby the plaintiff is required to submit a report and supporting documents. If this were so then the defendant's obligation would be at the conclusion of GIFA 2006, on 9 December 2006;

(c) the plaintiff's own witness in his evidence had testified that the payment
I was due on 19 January 2007 when the plaintiff submitted a report pursuant to cl 4(c) of the sponsorship agreement. The learned High Court judge found that the report submitted on 19 January 2007 fulfilled the terms of cl 4(c). Thus time began to run either from 9 December 2006 or 19 January 2007; and

(d) the acknowledgement by the defendant only extended to RM249,800.71 as stipulated in the defendant's letter dated 20 February 2009.

[45] It is trite that limitation accrues from the earliest time when there is a complete cause of action. In *Nadefinco Ltd v Kevin Corporation Sdn Bhd* [1978] 2 MLJ 59; [1978] 1 LNS 127, the Federal Court was of the view that the cause of action in that case accrued the instant the mining company failed to pay the first instalment due and therefore the action was barred by limitation, the action was commenced more than six years after the cause of action arose. The Federal Court referred to the general rule as stated by Willes J in the Court of Common Pleas in *Wilkinson v Verity* (1871) LR 6 CP 206 as follows:

> It is a general rule that where there has once been a complete cause of action arising out of contract or tort, the statute (of limitation) begins to run, and that subsequent circumstances which would but for the prior wrongful act or default have constituted a cause of action are disregarded. As, for instance, in the case of a bill of exchange drawn at so many months after sight, and refused acceptance, the cause of action is complete and the statute begins to run upon the refusal of acceptance, and no new cause of action arises upon refusal of payment.

The plaintiff's witness PW2 gave evidence that the payment to the plaintiff was due since 19 January 2007 when they had demanded for payment with the report they had submitted:

> D1: Mr Satnam, this amount is due and payable from the year 2006, would you agree with me? The grant that you are seeking to claim, the 3 million?
>
> PW2: I think it is due and payable to my company since the date that I submitted my complete GIFA report which was dated on, the letter dated 26 December 2006 but it was endorsed on 19 January 2007.

(Re: record of appeal Vol 2(1); p 235.)

[46] When PW2 was further questioned that based on all the letters the plaintiff's report was incomplete on 19 January 2007, PW2 disagreed. The learned High Court judge concluded that the plaintiff had fulfilled its obligations pursuant to cl 4(c) of the sponsorship agreement with the submission of the full report on 19 January 2007 and that the claim filed was not time-barred. In arriving at this conclusion, this is what the learned judge said:

> 86. It is my finding that the plaintiff's case is not time-barred ... The submission of the said full report was in compliance with the requirement of cl 4 of the sponsorship agreement and as described by learned counsel for the plaintiff, was purely a neutral act. There was no breach of the sponsorship agreement on either part of the plaintiff or the defendant at this point in time. The factual matrix of the

case show that even on 19 January 2007 the plaintiff had declared that a handful of documents were yet to be submitted. Even as at 6 July 2007 and 10 August 2007, the defendant had asked for documents.

[47] It was the intention of the parties as stipulated in the sponsorship agreement that the defendant's obligation to pay arises only at the conclusion of the GIFA 2006, which was on 9 December 2006 and upon the submission of the full report by the plaintiff. This was confirmed by the plaintiff's own witness who gave evidence that the defendant's obligation arose when the respondent submitted its report on 19 January 2007.

[48] For these reasons, we are unable to agree with the learned judge that the plaintiff's claim was not barred by limitation. The claim is clearly time-barred by virtue of s 6(1) of the Limitation Act 1953, which stipulates that a claim founded on contract or tort must be brought within six years from the date of accrual of the cause of action. Hence, when the action was filed in 2013 limitation has set in, except for the amount of RM249,800.71 which was acknowledged by the defendant on 20 February 2009.

CONCLUSION

[49] On those grounds and for the other reasons discussed and elaborated above, we allowed the appeal in part with no order as to costs. We set aside the order of the learned High Court judge and we made an order for the defendant to pay the balance sum of RM249,800.71 to the plaintiff. The deposit to be refunded.

Appeal was allowed and deposit refunded.

Reported by Afiq Mohamad Noor